STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Blackhawk Energy Services, L.L.C.	)	
	)	01-0174
Application for Certificate of Service	)	
Authority under Section 16-115 of the	)	
Public Utilities Act.	)	

BRIEF ON EXCEPTIONS OF
BLACKHAWK ENERGY SERVICES, L.L.C.

Blackhawk Energy Services, L.L.C. ("Blackhawk"), by its attorneys Piper Marbury Rudnick & Wolfe, hereby submits to the Illinois Commerce Commission ("Commission") its brief on exceptions to the Hearing Examiner's Proposed Order ("Proposed Order") that was issued on March 30, 2001 in the above-captioned proceeding. Blackhawk objects to this procedure which has afforded Blackhawk less than one (1) business day to file the instant brief on exceptions. Blackhawk renews its objection to the introduction of the Report of the Staff of the Illinois Commerce Commission ("Staff Report") as being contrary to Section 16-115 and violating Blackhawk's due process rights. Further, Blackhawk objects to the intervention of Kurt M. Granberg and J. Philip Novak ("Joint Intervenors") and the intervention of Local Unions 15, 51, and 1102 of the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") as being contrary to Section 16-115 of the Public Utilities Act ("Act") and the Commission's Rules of Practice. (*See* 220 ILCS 5/16-115; 83 Ill. Admin. Code 200.200.) Finally, Blackhawk objects to the Proposed Order since it relies upon more than the verified application and other verified information provided by Blackhawk in the instant proceeding. (*See* 220 ILCS 5/16-115(d).) Replacement language for the exceptions taken herein are attached hereto and made a part hereof as Attachment A.

I.

EXECUTIVE SUMMARY:

THE COMMISSION SHOULD ENTER AN ORDER APPROVING BLACKHAWK'S APPLICATION

Blackhawk's application complies with the requirements of the Act and should be granted. Based upon what had been a Commission-approved methodology for a demonstration of compliance with the reciprocity provisions of the Act, and in accordance with direction from the Staff of the Commission ("Commission Staff"), Blackhawk used a settled methodology to file an application that complies with the Act. Blackhawk submitted a verified application that demonstrated, among other things, that it is uneconomical for either Commonwealth Edison Company ("ComEd" or "Edison") or Illinois Power Company ("Illinois Power" or "IP") to serve retail customers in the service territory of Wisconsin Electric Company ("WE"). However, without providing a reasoned analysis supporting an abrupt change its previously established policy, the Commission Staff and now the Hearing Examiner have suggested that the Commission alter an established Commission policy. Neither the Staff Report nor the analysis in the Proposed Order presents a legitimate basis upon which the Commission could rely upon to change its policy.

The Commission must ask itself why the Hearing Examiner and Staff have had an epiphany regarding the Commission's interpretation of the reciprocity provision in Section 16-115 of the Act. Certainly, if the Commission does reverse its earlier policies, since the Hearing Examiner has instituted an unheard of process that has denied Blackhawk the opportunity to cross-examine witnesses against it and fully present its case, an appellate court will closely scrutinize the Commission's decision. (*See BPPI v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 228, 555 N.E.2d 693, 709 (1989).) There is

some suggestion that this sudden transformation has nothing to do with the law and everything to do with unseemly politics behind the law. (*See* Attachment B, which is attached hereto and made a part hereof.) Certainly, if the Commission's merit based compensation budget were at risk, the Staff might feel undue pressure to reach the "politically correct" conclusion. Regardless of the underlying motive of why the Commission finds itself in this situation, the Commission now must decide whether it is going to be an unbiased arbiter of the law and the facts presented in the instant proceeding. If the Commission enters such a decision in the instant proceeding, it will approve Blackhawk's application.

The process that led to the issuance of the Proposed Order was a complete travesty of justice that violated Blackhawk's rights. The Proposed Order is the product of Commission practice gone mad, including a complete and utter disregard for the Act, the Commission's Rules and the constitutionally-protected procedural due process rights of Blackhawk. In an unexplained but obvious desire to reverse the Commission's prior decision regarding its interpretation of Section 16-115(d)(5) of the Act ("reciprocity provision"), the Proposed Order improperly relies upon a procedurally infirm and substantively flawed Staff Report to suggest that Blackhawk's application should be denied. If the Commission were to adopt the Proposed Order as its Final Order in the instant proceeding and deny Blackhawk's application, it most certainly would constitute reversible error. (*See* 220 ILCS 5/10-102(e)(iv), 16-115.)

Further, it has been widely acknowledged by participants in the Illinois retail electric market that the reciprocity provision of the Act would not withstand a constitutional challenge. In fact, the reciprocity provision's unconstitutional burden on interstate commerce has been well known since passage of the Customer Choice Act.

For example, Ameren Energy Marketing Company threatened to the Commission that it would challenge the constitutionality of the reciprocity provision if the Commission dared to deny its application for certification as an ARES. (*See* Ameren Energy Marketing Company, Application for Certification as an ARES, filed July 7, 2000.)

Blackhawk respectfully requests that the Commission revise the Proposed Order and enter an Order that:

(1) Comports with the provisions of the Act;
(2) Comports with the requirements of the Commission's Rules;
(3) Comports with past Commission decisions regarding certification of alternative retail electric suppliers ("ARES");
(4) Relies upon the realities of the marketplace for electric power and energy to determine whether Edison and Illinois Power can economically serve the retail electric customers of WE;
(5) Concludes that Edison and Illinois Power cannot economically serve the retail electric customers of WE based its previously-approved method for such a demonstration;
(6) Grants Blackhawk a certification of service authority as an ARES in Illinois; and
(7) Grants such other or additional relief that the Commission deems necessary and appropriate to grant Blackhawk's application.

Absent the adoption of such an Order, Blackhawk is prepared to challenge the constitutionality of the reciprocity provisions of the Act and the procedures which trampled Blackhawk's due process rights.

Blackhawk does not desire to file such an appeal, especially given the impact that such an appeal would have upon the Illinois retail electric market. However, to the extent that the Commission does not even afford Blackhawk due process under the Act, or adhere to the tests regarding the reciprocity provision that the Commission itself has established, Blackhawk will be faced with no alternative but to file such an appeal.

II.

THE PROCEDURE EMPLOYED IN THE INSTANT PROCEEDING VIOLATED THE ACT, THE COMMISSION'S RULES AND REGULATIONS AND ALL NOTIONS OF DUE PROCESS

The procedure that was blessed by the Hearing Examiner is contemplated under neither the Act nor the Commission's rules and regulations. In the past week alone, the procedure that was established by the Hearing Examiner was completely without order or direction and allowed for an unprecedented flood of last-minute interventions, pleadings, and arguments that were illegal. The Proposed Order's baseless assertion that there was not enough time adequately address the issues presented in the instant proceeding is offensive. (*See* Proposed Order at 20.) Any procedural problems were of the Hearing Examiner's own making. Because the Hearing Examiner has bastardized the process, the resulting Proposed Order, if accepted by the Commission would not withstand appellate scrutiny.

A. CONTRARY TO THE ASSERTION IN THE PROPOSED ORDER, THERE WAS AMPLE TIME FOR THE COMMISSION TO DEVELOP A RECORD

It is disingenuous for the Proposed Order to assert that the forty-five (45) day statutory deadline on this proceeding may have had an "adverse effect on the parties' ability to more fully develop the record." (Proposed Order at 20.) Not only was there ample time **after** Blackhawk submitted its Application for an ARES certificate but Blackhawk worked with the Commission Staff **prior** to submission of the Application in an attempt to make sure that the Commission Staff was comfortable with the entire Application, including the demonstration of compliance with the reciprocity provision in the Act. The Commission has certified sixteen (16) ARES in Illinois since the enactment of the Customer Choice Act, including at least eight (8) ARES that are somehow

affiliated with utilities. Never before has the Commission cited a "lack of ample time to develop a record" as an issue in an ARES certification proceeding.

On November 29, 2000, prior to submission of Blackhawk's Application, Blackhawk provided the Commission Staff with a confidential copy of a "draft" Application. On January 26, 2001, based upon the comments of the Commission Staff, some of which addressed issues pertaining to the reciprocity provisions contained in Section 16-115(d)(5) of the Act, Blackhawk provided the Commission Staff with a revised draft of Blackhawk's Application. (*See* 220 ILCS 5/16-115(d)(5).) After receiving another round of comments from the Commission Staff on January 31, 2001, and revising its Application accordingly, Blackhawk formally submitted its Application to the Commission on February 16, 2001. Included with its twelve (12) page Application were attachments totaling approximately eighty (80) pages. On February 20, 2001, proof of Blackhawk's submission to the Commission was published in the Edwardsville Intelligencer, the official state newspaper.

Since February 16, 2001, Blackhawk has been asked to respond to three (3) independent requests from the Hearing Examiner for information and/or clarification ("Hearing Examiner's Requests") that were served upon Blackhawk on February 27, 2001, March 15, 2001, and March 19, 2001. Blackhawk provided timely responses to each of the Hearing Examiner's Requests, some of which required responses within less than two (2) business days. Some of the Hearing Examiner's Requests sought additional information, including workpapers, and the rationale for the demonstration of compliance with the reciprocity provisions in the Act. Blackhawk was never informed that any of the information provided was non-responsive, insufficient or incomplete. There was not a single inquiry from the Commission Staff to request further clarification or information.

Without receiving prior notice, on Friday, March 23, 2001 at approximately 4:45 p.m., Blackhawk received an "Official Commission Notice of Case or Proceeding" ("Official Notice") directing Blackhawk that it had until 4:00 p.m. on March 27, 2001 to file any verified response to a yet unknown "Staff Report." Upon receipt of the Official Notice, Blackhawk was unaware of the existence of any Staff Report that was allegedly submitted in the instant proceeding. In fact, at the time of receipt of the Official Notice, Blackhawk had **not** been served with any Staff Report, much less provided with any notice of the impending nature of the filing of a Staff Report. On Friday, March 23, 2001 at approximately 5:26 p.m., **after the close of business**, Blackhawk finally received an electronic version of the aforementioned Staff Report. The Staff Report, which was roughly 12 pages, was filed without any supporting workpapers or background materials.

Even though Staff had been on notice for approximately four (4) months regarding Blackhawk's position on the reciprocity issue, Blackhawk was given less than two (2) business days to prepare and file its Response to the Staff Report. Due solely to the process endorsed by the Hearing Examiner, Blackhawk was not provided with an opportunity to properly cross-examine witnesses regarding the basis for the Staff Report, nor was Blackhawk allowed to fully rebut the false assertions contained in the Staff Report. The bizarre scheduling by the Hearing Examiner and the conduct of the Commission Staff placed Blackhawk in a "catch-22" situation in its attempt to railroad Blackhawk's Application: either object to the unacceptable procedure, risking that the Hearing Examiner would accept the substance of the Staff Report; or object to the obvious substantive defects in the Staff Report, knowing other flaws probably exist, risking that the Hearing Examiner would ignore the objections to the procedure. Nevertheless, Blackhawk filed a timely Response to the Staff Report, objecting to the

illegal procedure and debunking the clearly flawed analysis in the Staff Report. (*See generally* Blackhawk's Response to the Staff Report.)

Apparently recognizing the persuasiveness of Blackhawk's Response, **after Blackhawk filed its Response to the Staff Report**, Blackhawk received Official Notice that other parties would have an opportunity to submit a Reply to Blackhawk's Response. Although Blackhawk filed a motion for leave to file a surreply regarding the Staff Report, the Hearing Examiner did not act upon that request prior to issuing the Proposed Order. Essentially, other parties were allowed to have the "last word" in clear violation of the Commission's Rules. (*See, e.g.*, 83 Ill. Admin. Code 200.25.) As a result of this illegal procedure, Blackhawk did not receive copies of the Joint Intervenors' petition to intervene and comments until April 2, 2001 -- after the Proposed Order was issued and on the same date that the instant brief on exceptions had to be filed.

Based solely upon the asserted the "lack of time" that resulted from the Hearing Examiner's bizarre scheduling, the Hearing Examiner recommends that the Commission deny Blackhawk's application. Such a hijacking of due process should not be tolerated.

Blackhawk respectfully requests that the Commission revise the Proposed Order and enter an Order granting Blackhawk an ARES certificate based upon the verified application, and additional verified information provided by Blackhawk in the instant proceeding.

B. THE PROCEDURE EMPLOYED BY THE HEARING EXAMINER VIOLATES SECTION 16-115 OF THE ACT

The Hearing Examiner utilized a procedure in the instant proceeding that violates the plain language in the Act in an attempt to reach a conclusion that is not supported by the information that is to be considered by the Commission in ARES certification proceedings. As a result, the procedure has prejudiced Blackhawk in its efforts to prepare

a proper legal and substantive response to the Staff Report, Staff's Reply to Responses to the Staff Report, intervention and argument of other parties, and has denied Blackhawk its procedural due process rights. If Blackhawk had been given the opportunity to cross-examine Staff's witness or present a surreply to the replies filed by Staff and the Joint Intervenors, Blackhawk would have been able to show:

The process blessed by the Hearing Examiner in the instant proceeding invites parties to:

- wait until the last minute to intervene;
- file pleadings that are not contemplated under the Act or the Commission's rules and regulations; and
- base their pleadings upon fundamental misrepresentations of the Act, the legislative history of the Act and the basics of economics and the workings of the wholesale and retail electric markets.

Indeed, it appears that the later and more convoluted the pleadings, the more doubt the intervenor might be able to raise. Such a process should not, and cannot legally, be tolerated by the Commission.

In the Act, there are clear procedural requirements associated that an applicant must comply with in order to become certificated by the Commission as an ARES. (*See* 220 ILCS 16-115.) The Act provides that an applicant is required to include with its application a **certification** that the Illinois electric utility cannot physically or economically serve in its utility affiliate's service area. Significantly, the Act does **not** require that the applicant **prove**, by a preponderance of the evidence or otherwise, that the Illinois electric utility cannot physically or economically serve in its utility affiliate's service area. Blackhawk has complied with the Act.

If the Commission were to adopt the Proposed Order, it would not be based upon the clear requirements set forth in the Act. As a result, it would constitute reversible error.

The Commission's authority is well settled under Illinois law. An administrative agency is created by statute and has no general or common law powers. The authority of an agency must either arise from the expressed language of the enabling statute, or devolve by fair implication and intendment from the express provisions of the statute as an incident to achieving the objectives for which the agency was created. The Commission has no authority except that expressly conferred upon it and is without a power to extend its jurisdiction, as that is a legislative prerogative. *Peoples Gas Light and Coke Co. v. Illinois Commerce Comm'n*, 165 Ill. App. 3d. 235, 520 N.E.2d 46, 54 (Ill. App. 1987). The Commission's only powers are that conferred upon it by the General Assembly, and it has no arbitrary powers. *Illinois Commerce Comm'n v. New York Central Ry. Co.*, 398 Ill. 11, 75 N.E.2d 411, 414 (1947). In short, the Commission is not entitled to freelance in its exercise of authority under the Act, and must act in accordance with the authorities and duties delegated to it by the General Assembly.

In Section 16-115 of the Act, the General Assembly delegated to the Commission the authority to certify ARES. (*See* 220 ILCS 5/16-115.) The General Assembly also delegated to the Commission "the authority to promulgate rules and regulations to carry out the provisions of this Section." (220 ILCS 5/16-115(f)). The undue process that the Hearing Examiner used in the instant proceeding is contrary the Act and contrary to the Commission's Rules and regulations. If the Commission were to enter an Order denying Blackhawk's application, it would not withstand appeal. (*See BPPI*, 136 Ill.2d at 228, 555 N.E.2d at 709.)

1. The Admission of the Staff Report Into the Record And The Proposed Order's Reliance Upon The Staff Report Violates The Act And The ARES Certification Regulations

The provisions of Section 16-115 of the Act govern the instant proceeding. Section 16-115(d) of the Act requires the Commission to grant an application for a certificate of service authority if it makes findings based upon **the verified application and such other information as the applicant may submit**. (*See* 220 ILCS 5/16-115(d).) (Emphasis added.) Contrary to the assertions in the Proposed Order, Section 16-115 of the Act does not allow the Commission to base its decision on information provided by the Commission Staff or any other person. (*See* Proposed Order at 19.) It appears that the sole basis for this assertion in the Proposed Order is the Commission's new-found interpretation of this issue in an Order Reopening WPS Energy Services' ARES certification proceeding, ICC Docket No. 00-0199. This is an improper basis upon which the Commission should base its analysis, especially considering the fact that the legality of the Commission's Order Reopening the WPS proceeding is the subject of a legal challenge.

In three separate proceedings, the Commission has promulgated rules pertaining to the certification of ARES. (*See Illinois Commerce Commission, Implementation of Section 16-115(f) of the Act*, ICC Docket. No. 98-0544 (Dec. 16, 1998); *Illinois Commerce Commission, Certification of ARES Not Seeking Expedited Treatment*, ICC Docket. No. 98-0649 (June 30, 1999); and *Illinois Commerce Commission, Amendment of Part 451*, ICC Docket. No. 99-0614 (Aug. 15, 2000).) Complete and comprehensive sets of ARES certification rules have been adopted which must be adhered to by both applicants and the Commission. None of the ARES certification rules provide for submission of arguments, reports, or comments by any party other than the applicant.

Furthermore, allowing the Staff Report to become a basis for a Commission decision regarding Blackhawk's Application, violates Blackhawk's due process rights and constitutes reversible error.

2. Allowing Other Parties To Participate In The Instant Proceeding Is Not Contemplated By The Act Or The Commission's Rules

The provisions of Section 16-115 of the Act, the Commission's Rules, and the ARES Certification Rules govern the issue of intervention and participation in the instant proceeding. (*See* 220 ILCS 5/16-115; 83 Ill. Admin. Code 200.200; 83 Ill. Admin. Code 451.) Nowhere is there any authority which would authorize parties other than the applicant to submit evidence, argument or pleadings in the instant proceeding.

Section 16-115(d) of the Act requires the Commission to grant an application for a certificate of service authority if it "makes findings *based upon the verified application and such other information as the applicant may submit*." (*See* 220 ILCS 5/16-115(d).) (Emphasis added.) Section 16-115 of the Act does not allow the Commission to allow intervention of any person into the application process, much less base its decision upon information provided by any other person. Thus, the Commission lacks statutory authority to allow the Staff, IBEW, the Joint Intervenors or any other party to participate in the instant proceeding. By allowing the Staff, IBEW and others to become parties to the instant proceeding and to become active parties, violates Blackhawk's due process rights and constitutes reversible error. (*See id.*) (*See also Balmoral Racing Club, Inc. v. Illinois Racing Bd.*, 151 Ill.2d 367, 404, 603 N.E.2d 489, 507 (1992), *citing Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913).)

Either Blackhawk was correct in explaining the instant proceeding was an application process governed by the terms of Section 16-115 of the Act which does not

allow parties to intervene or the instant proceeding is a "contested case" under the Administrative Procedure Act. (*See* 5 ILCS 100/1-30.) In contested cases before the Commission, parties are entitled to a hearing, an opportunity to present evidence and the ability to cross-examine adverse witnesses. (*See id*.) (*See also Abrahamson v. Illinois Dep't of Prof. Regulation*, 153 Ill.2d 76, 92, 606 N.E.2d 1111, 1120 (1992); *People ex rel. Ill. Commerce Comm'n v. Operator Communication, Inc.*, 281 Ill. App. 3d 297, 301-03, 666 N.E.2d 830, 832-34 (1st Dist.), *appeal denied* 168 Ill.2d 623, 671 N.E.2d 742 (1996); *Stillo v. State Retirement Sys.*, 305 Ill. App. 3d 1003, 1009, 714 N.E.2d 11, 16 (1st Dist. 1999).) Blackhawk was not afforded these basic due process protections.

III.

THE PROPOSED ORDER IMPROPERLY ATTEMPTS TO DISGUISE THE FACT THAT IT RELIES UPON STAFF'S FAULTY REPORT AND ANALYSIS TO REACH ITS CONCLUSION

The Proposed Order asserts that the analyses provided by both Staff and Blackhawk are "largely unpersuasive due to the lack of detail for the Commission to evaluate." (*See* Proposed Order at 20.) Blackhawk agrees that the Staff Report relied upon a flawed premise that ignores the realities of the marketplace for electric power and energy. However, a review of the "Commission Analysis and Conclusion" section of the Proposed Order indicates that the Proposed Order suffers from the same lack of understanding of the marketplace for electric power and energy. It appears that common sense, logic, and the plain and simple truth have been abandoned in the Commission's efforts to find a reason to conclude that Edison and Illinois Power can economically serve the retail electric customers of WE.

A. THE COMMISSION'S "NEW" INTERPRETATION OF SECTION 16-115 OF THE ACT IS WHOLLY WITHOUT SUPPORT

On March 16, 2001, the Commission entered an Order to Reopen the proceeding in which WPS Energy Services, Inc. had been granted a certificate of service authority to operate as an ARES in Illinois. (*See* Order Reopening Proceeding, ICC Docket No. 00-0199.) According to the Commission, the proceeding was being reopened "to consider and determine, on an expedited basis, whether it should rescind, alter or amend the Order it entered in this proceeding on April 18, 2000, with the scope of the reopening limited to further consideration of whether WPS Energy meets the standards set forth in Section 16-115(d)(5) of the Act." (*See* Order Reopening at 6.) Additionally, the Commission directed its Staff to prepare and file a report to discern whether "there are any other sets of assumptions (and if so, what those assumptions are) which would assist the Commission in determining whether either of WPS Energy's retail affiliates serves a defined geographic area to which electric power and energy can be physically and economically delivered by the four electric utilities in whose service areas WPS Energy sought to provide ARES service." (*See id.* at 5.) The Commission also directed the Staff to consider the possibility that Illinois utilities could sell power and energy from generating sources located outside of Illinois. (*See id*.) Certainly, the legality of the Commission's Order Reopening the WPS proceeding is questionable at best and is currently the subject to a Motion from WPS to be Set Aside.

As the Commission is aware, on April 18, 2000, WPS received its certification to operate as an ARES. In deciding that WPS Energy was entitled to a certificate, the Commission considered analyses for the purpose of assessing the economic delivery standard in Section 16-115(d)(5) of the Act. The Commission concluded that it would not be economical under any of the analyses presented for Illinois electric utilities to

deliver electric power and energy to the service areas of WPS Energy affiliates at this time. (*See* Order at 9.)

The principle of reciprocity set forth in Section 16-115(d)(5) of the Act is more logical, symmetrical and attentive to actual energy market conditions. While the Act's reciprocity provision does disqualify some applicants for ARES certification whose non-Illinois utility affiliates do not provide delivery services comparable to those provided by Illinois utilities, the terms of disqualification are limited to those circumstances in which a given Illinois utility could not physically or economically deliver power and energy to the non-Illinois utility. The physical and economical test in the Act's reciprocity provision cannot be disregarded.

However, based upon the Order Reopening the WPS Energy proceeding, the Commission's suggested interpretation would apply the reciprocity provision with respect to denial of ARES certification to an affiliate of a utility in a location that could not be physically served by power and energy from the Illinois utility. Examples of such situations might include an ARES affiliate of a distribution utility in a foreign country or in Texas. In neither case could an Illinois utility physically deliver power and energy. Therefore, such an applicant would still be in full compliance with the reciprocity provision in the Act. Similarly, the Act requires consideration by the Commission of whether a given Illinois utility could not economically serve even if it could do so physically.

B. BLACKHAWK'S ANALYSIS IS CONSISTENT WITH PRIOR COMMISSION DECISIONS AND THE WAY IN WHICH THE MARKETPLACE FOR ELECTRIC POWER AND ENERGY OPERATES

In its Application, supporting attachments, responses to the Hearing Examiner's Requests for Additional Information, and Response to the Staff Report, Blackhawk has presented an analysis that is consistent with prior Commission decisions regarding how to interpret the reciprocity requirement in the Act. Blackhawk's analysis, that is consistent with the Commission's prior interpretation of the reciprocity requirement in the Act, accurately reflects the way in which the marketplace for electric power and energy operates.

1. Blackhawk's Analysis Is Consistent With Prior Commission Decision's Regarding The Reciprocity Requirement In The Act

The Commission has concluded that as long as an ARES Applicant can demonstrate that it is either uneconomical or physically impossible for an Illinois electric utility to deliver electric power and energy to retail customers of an out-of-state utility affiliate, the ARES Applicant can meet the reciprocity requirements in the Act. (*See*, Wisconsin Public Service Energy Services, Inc., *Application for a Certificate of Service Authority as an Alternative Retail Electric Supplier*, Docket 00-0199, Order at 9.) Throughout the instant proceeding, Blackhawk has demonstrated that it complies with the reciprocity requirements of the Act because electric power and energy cannot be economically delivered from the service territories of Commonwealth Edison Company ("Edison") and Illinois Power Company ("Illinois Power" or "IP") to serve retail load in the service areas of Blackhawk's utility affiliates.

In Docket No. 00-0199, the Commission found that WPS Energy was able to demonstrate that certain Illinois utilities could not economically deliver electric power

and energy to affiliates of WPS Energy under current market conditions. The Commission also concluded that since it was uneconomical for certain Illinois utilities to deliver electric power and energy to utility affiliates of WPS Energy, that it was unnecessary for WPS Energy to also demonstrate that it is physically impossible to deliver electric power and energy to such affiliates at this time.

Thus, in Docket No. 00-0199, the Commission determined that as long as an ARES Applicant can demonstrate that it is **either** uneconomical **or** physically impossible for an Illinois electric utility to deliver electric power and energy to retail customers of an out-of-state utility affiliate, the ARES Applicant can meet the requirements of Section 16-115(d)(5) of the Act. (*See* 220 ILCS 5/16-115(d)(5).)

Likewise, Blackhawk has demonstrated that it is uneconomical for Edison and Illinois Power to deliver electric power and energy to retail customers of Blackhawk's affiliates' WE and Edison Sault. Blackhawk relied upon the identical methodology used by WPS Energy to demonstrate that it is uneconomical. In addition, Blackhawk calculated the total cost to deliver electric power and energy to retail customers of WE and Edison Sault by using the same cost components that the Commission accepted in the WPS Energy application.

2. Blackhawk's Analysis Is Consistent With The Way In Which The Marketplace For Electric Power And Energy Operates

The basic premise for the analysis contained in the Staff Report is that wholesale power costs do not vary with load factors since a demand charge is required for retail power costs but is not required for wholesale power costs. The Proposed Order states that if this is correct, then it would stand to reason that Edison and Illinois Power could economically deliver power and energy to WE's retail customers at certain low load

factors. (*See* Proposed Order at 20.) However, this basic premise is simply not true and demonstrates a lack of understanding regarding the marketplace for electric power and energy.

While the Staff was ultimately forced to admit that there is a cost for purchasing capacity in the wholesale market, the Staff Report does not even attempt to reflect this cost in the wholesale cost of electric power and energy. Staff makes the absurd assertion that this cost would be the same for two customers with same demand but different load factors. (*See* Staff Reply to Blackhawk Response at 4.) Again, this assertion, as well as the Proposed Order's analysis, fails to reflect the realities of energy markets and highlights a severe lack of knowledge on this issue.

The cost of wholesale electric power varies hourly, depending upon many factors including weather, units in service, and current fuel costs. Firm wholesale electric power products are priced to reflect these variations in costs. The Proposed Order, as well as the Staff Report, fail to recognize this fact. While it is common for wholesale electric power contracts to not have separate demand charges, there has been no demonstration by the Hearing Examiner or Staff that any contracts have restrictions on load factor. Firm wholesale electric power contracts typically address the issue of load factors in one of several ways:

- A separate demand charge;
- A requirement that electric power is taken at a specified load factor. (wholesale electric power is commonly sold in 100% load factor blocks for the on-peak hours of the period under contract, such as electric power purchased on the basis of the Cinergy Index.); or
- Requiring that the purchaser take electric power within a specific range of load factors.

By using either one of the last two approaches, firm electric wholesale power can be priced to adjust the price of energy if a separate demand charge is not used for capacity. Because the rate design used by Edison in its PPO tariff does not contain separate demand charges, Blackhawk demonstrated how a ***firm wholesale energy price*** would change when load factors vary. (*See* Blackhawk Response to Staff Report at 5-6.)

As demonstrated by Blackhawk in its Response to the Staff Report at page 5-6, firm retail customers need to be served by purchasing firm power in the wholesale market, which includes energy and capacity. Depending upon on how the power is purchased and priced, there may be a separate reservation or demand charge for capacity or it may be included in the price for power. (*See* Blackhawk Response to Staff Report at 4.) Therefore, contrary to the assertions in the Proposed Order as well as the Staff Report, the cost to purchase power in the wholesale market for two customers of the same demand size but different load factors would not be the same.

In fact, contrary to the assertions in the Staff Report, the cost to purchase power to supply a customer with a load factor of 80% is much lower on a $/MWH basis than the cost to purchase power for the same size customer with a load factor of 30%. (*See id.* at 4.) At least one of the reasons for the inaccurate conclusion contained in the Proposed Order and the Staff Report is the mistaken and improper reliance upon average prices to calculate costs for customers with specific load factors.

C. CONTRARY TO THE CONCLUSION IN THE PROPOSED ORDER, EDISON CANNOT ECONOMICALLY SERVE WE'S RETAIL CUSTOMERS

Contrary to the conclusion in the Proposed Order, Edison cannot economically serve retail customers in WE's service territory. Based upon the methodology accepted by the Commission in its order in the WPS Energy Services ARES certification

proceeding, ICC Docket No. 00-0199, Blackhawk utilized the average prices from Edison's PPO tariff as the market values. However, the Proposed Order, without warning, notice, or fair process, declares that "it is inappropriate to examine this issue solely on the basis of average customer classes." (*See* Proposed Order at 20.) Blackhawk worked with the Commission Staff for well over three (3) months to fully understand Staff's interpretation of the reciprocity provisions before Blackhawk formally submitted its application to the Commission. For the Commission to now change course to satisfy some other unstated and improper agenda is illegal, disingenuous and provides clear grounds for reversal on appeal.

Based upon the express language in Section 16-115(d)(5) of the Act, Staff's analysis is improper. Staff turns logic on its head by asserting that the "economical and physical" test in Section 16-115(d)(5) of the Act applies to merely a hypothetical subset of customers. The average cost analysis presented by Blackhawk is logical and appropriate. The low-load factor test presented in the Staff Report is inappropriate and inaccurate. Because electric power costs change considerably to serve customers at varying load factors, a low load-factor test will yield inaccurate results when average market values are used rather than the market energy costs that would actually be incurred. Very little information exists publicly in which to develop predicative market prices. The only market information that is typically available for the next year is monthly forward on-peak, 100% load factor prices, such as the Cinergy index. Predicative market price information for other periods such as weekly, hourly, and off-peak market prices are not typically available, except on a short-term basis (within the next day or next week). Such information would be necessary to make an appropriate analysis of costs to serve low load factor customers. An analysis using an average load

factor using average market data is a much more appropriate test than a much less accurate low-load factor test.

1. Staff Failed To Properly Adjust The Load Factors Utilized In Its Report

The market values contained in Edison's PPO tariff are based upon average load factors for the customer class. The prices in the PPO tariff do not represent the actual costs that a wholesale purchaser would incur for customers with specific load factors. As stated in Blackhawk's Response to the Staff Report at page 4, the analysis contained in the Staff Report, which calculated costs for customers with varying load factors, fails to reflect the actual costs that would be incurred at the lower load factors.

In order to provide a more appropriate and realistic analysis of costs that a wholesale purchaser would incur to serve customers at varying load factors, the market prices would need to be adjusted to reflect customer specific load factors. At a minimum, the cost of capacity and transmission need to be adjusted to reflect the actual load factor. In order to serve a retail customer, capacity and firm transmission would need to be purchased to cover the peak demand of the customer.

In its application, Blackhawk estimated the current market value of capacity at $5/kw/month. In its application, Blackhawk demonstrated that the cost of Edison transmission is $11,370 per MW/year; and that the cost of Illinois Power transmission is $8,788 per MW/year. Based upon these prices, Blackhawk also demonstrated the portion of the wholesale cost of power and energy that capacity and transmission would represent for a range of load factors. (*See* Blackhawk Response to Staff Report at 6, Table 1.)

The Proposed Order fails to recognize this fundamental flaw in the Staff Report. Blackhawk respectfully requests that the Commission recognize that the analysis in the

Staff Report failed to properly adjust the load factors and accept the analysis contained in Blackhawk's application.

2. The Staff Report Failed To Properly Adjust For Energy Losses And Transmission In Its Report

The Proposed Order fails to recognize that the Staff Report does not appropriately adjust for energy losses that would be experienced and the costs that would be incurred in transmitting energy from Edison to WE's service area. In Blackhawk's analysis, since energy losses were already included in Edison's market energy prices and were not broken out separately, Blackhawk did not calculate these costs separately. However, the methodology in the Staff Report, which examined a hypothetical subset of customers, failed to include these costs.

Because the cost for transmission losses are a percentage of the total cost of energy and capacity and the price of capacity increases on a $/MWH basis as load factor decreases, the cost for each MWH of transmission losses for the lower load factor customers would also increase. (*See* Blackhawk Response to Staff Report at 7.) Thus, transmission losses would be higher on a $/MWH basis for lower load factor customers as compared to higher load factor customers. (*See id.*)

The Proposed Order fails to recognize this fundamental flaw in the Staff Report. Blackhawk respectfully requests that the Commission recognize that the analysis contained in the Staff Report failed to include adjustments for line losses and the costs of transmission and accept the analysis contained in Blackhawk's application.

3. Staff Failed To Properly Adjust The Energy Price Utilized In Its Report

The Proposed Order fails to appropriately criticize the Staff Report for failing to properly adjust the energy price, since the average energy price was used. The actual

price paid for energy in the marketplace would be based upon the time period when the energy is used. It is a fundamental concept of energy prices that the price for a customer who uses power solely during peak periods will be dramatically different than the price of power for customers that use power solely during off-peak periods. Unless a specific customer is analyzed with its associated on-peak and off-peak energy usage profile, there are many potential combinations of the on-peak and off-peak energy profiles. (*See* Blackhawk Response to Staff Report at 7.)

While Staff agreed that there are many combinations of on-peak and off-peak energy usage and seasonal usage by customers, Staff implies that the average market cost for firm wholesale electric power would apply to all of these customers. (*See id.* at 4-5.) Again, this is simply untrue. The actual costs these customers would pay for market-priced electric power would be a function of the hourly cost of the wholesale electric power during the time periods the customer typically consumes electric power. Applying the average costs Staff calculated in its reply would not be appropriate to apply to all customers at a certain load factor.

Thus, the Proposed Order shockingly failed to criticize the Staff Report for improperly relying upon average energy prices without adjusting for energy usage profiles.

4. Staff Incorrectly Described The Blackhawk Analysis In An Attempt To Justify Its Flawed Conclusion

The Staff Report incorrectly claimed that Blackhawk calculated a cost of Edison to serve Cp-1 customers. As a result, the Staff Report asserted that Edison could economically serve WE retail customers in the Cp-1 rate class at load factors between 40 – 50%. (*See* Staff Report at 2-3.) Since the Proposed Order fails to provide a reasoned

basis for reaching the same conclusion, Blackhawk can only surmise that the Hearing Examiner must have relied upon the flawed Staff Report.

In its application, Blackhawk calculated the market costs for Edison to serve Primary High Voltage customers, not Cp-1 customers. (*See* Blackhawk Application, Attachment C at Table 1.) The costs to serve Primary High Voltage Customers were obtained from a cost of service study ("COSS") prepared by the Wisconsin Public Service Commission. What the Staff Report fails to acknowledge (or even mention) is that the Cp-1 tariff does not contain separate rates to deliver power to Cp-1 customers. Blackhawk used the COSS as it contained a breakout of a delivery charge. The Cp-1 tariff does not contain a functional cost for delivery services and is therefore subject to substantial interpretation as to how costs would be allocated if a cost for delivery services were removed from the rate. Thus, the COSS provided a delivery services cost for all WE Primary High Voltage customers, on all WE rates, not just Cp-1. In the WPS ARES certification proceeding, the Commission previously accepted using a COSS to calculate the costs for the utility of an applicant.

In an attempt to provide the Staff with more detailed information, and in responding to the Staff Report, Blackhawk calculated separate adjusted market values for each load factor. The adjusted market values calculated by Blackhawk made adjustments for the additional capacity and transmission costs that would be incurred by low-load factor customers.

5. The Cost For Edison To Serve Each Cp-1 Customer At Each Load Factor Is Greater Than The Cp-1 Tariff Rates

Contrary to the assertions in the Staff Report and the Proposed Order, the cost for Edison to supply each Cp-1 customer is **greater** for each load factor than the Cp-1 tariff rates. As stated in Blackhawk's Response to the Staff Report at page 8, Blackhawk

calculated separate adjusted market values for each load factor. The market values were calculated by taking the baseline market value for an 80% load factor customer and then adjusting the market value for additional or lower capacity and transmission costs at the other load factors. A summary of the load-factor adjusted market costs for Edison to serve WE Primary High Voltage customers were also provided in Blackhawk's Response to the Staff Report. (*See* Blackhawk Response to the Staff Report at 8, Table 2.)

Blackhawk demonstrated that the cost for Edison to supply Cp-1 customers at each load factor is greater than the Cp-1 cost listed in the Staff Report. However, the Proposed Order fails to conduct any analysis, let alone a reasoned analysis, of Blackhawk's demonstration. Thus, contrary to the conclusion in the Proposed Order, the Blackhawk has demonstrated that Edison **cannot** economically supply WE retail electric customers.

The Proposed Order improperly fails to explain the basis for its findings. This alone would constitute reversible error if the Commission were to accept the Proposed Order. (*See* Proposed Order at 20.) If the Proposed Order based its conclusions upon the Staff Report, it likewise would constitute reversible error for the Commission to accept the Proposed Order. The Staff Report contains no analysis to support its assertion that since Edison's incremental costs are lower than its market cost, it could serve even more WE retail customers. The Staff Report summarily, without any demonstration, analysis, or calculation, concludes that since Edison's incremental costs are lower than its market costs, that Edison could serve even more WE retail customers. However, a proper and realistic calculation of Edison's incremental costs would need to be adjusted to account for load factor if the average load factor is not used.

Although Blackhawk included an incremental cost comparison with its application, this comparison was included solely based upon a request from Staff. As explained in Blackhawk's Response to the Staff Report at page 9, such a cost comparison is an inappropriate basis upon which to determine if an Illinois electric utility could economically serve retail customers in WE's service territory. Since the incremental costs of Edison and IP are currently less than market costs, it would be uneconomic for an Illinois utility to make the decision to sell to a WE retail customers at less than market costs, thus making an incremental cost analysis uneconomic and inappropriate.

6. Edison Could Sell Power Into The Wholesale Market At A Higher Value Than Selling The Power To WE's Retail Customers

It would be uneconomical for Edison to serve retail customers in WE's service territory, since Edison could sell the power and energy in to the wholesale market at a price greater than that which would receive it were to sell power and energy in WE's service area. It is improper, illogical, and uneconomic to base the economic analysis upon the assumption that Edison would not take actions to maximize its profits. (*See id*. at 9.) The basis for the assertions in the Staff Report and the Proposed Order is that Edison would act contrary to its own economic self-interest. There is no basis for this assumption.

In addition, the Proposed Order completely fails to acknowledge the other costs Edison would be exposed to if it were to sell power to retail customers that would not exist in the wholesale market. Edison would be exposed to potentially costly energy imbalance costs if it served retail customers in WE's service territory. (*See id*. at 10.) The Proposed Order improperly fails to recognize the fact that these costs are even more

risky for lower load factor customers where the uncertainty and timing of the actual load, by definition, is less predictable. (*See* Proposed Order at 19-20.)

D. CONTRARY TO THE CONCLUSION IN THE PROPOSED ORDER, ILLINOIS POWER CANNOT ECONOMICALLY SERVE WE'S RETAIL CUSTOMERS

The Proposed Order relies upon the same unexplained and mysterious assertions to support its assertion that Illinois Power would be able to economically serve WE's retail customers. (*See* Proposed Order at 20.) Again, it appears that the Proposed Order may have relied upon the Staff Report to reach its inaccurate and improper conclusion. If so, the Staff Report used the same flawed logic as relied upon for Edison. (*See* Staff Report at 3.) As stated in Blackhawk's Response to the Staff Report at page 10, the Staff Report improperly relied upon an "apples to oranges" comparison that mixes average costs with actual costs Illinois Power would incur to provide power to the lower load factor customers. Again, the Staff Report misrepresents the calculations utilized in Blackhawk's application.

1. Staff Misrepresented Blackhawk's Calculations

Contrary to the assertions at page 3 of the Staff Report, Blackhawk actually calculated the market costs for Illinois Power to serve Primary High Voltage customers and Commercial TOU customers, not Cp-1 or Cg-3 customers. The costs to serve Primary High Voltage Customers and Commercial TOU customers were obtained from a cost of service study prepared by the Wisconsin Public Service Commission since the Cp-1 and Cg-3 tariffs do not contain separate rates to deliver power to Cp-1 or Cg-3 customers.

Nevertheless, in its Response to the Staff Report, Blackhawk recalculated Illinois Power's NFF derived market cost of $48.95 per MWH (the calculated IP market cost to

serve certain Primary High Voltage customers that was referenced in paragraph 6 of the Staff Report. (*See* Blackhawk Response to Staff Report at 11, Table 3.) Blackhawk's demonstration reflects the **actual** costs associated with varying load factors.

2. The Cost For IP To Serve Each Cp-1 Customer At Each Load Factor Is Greater Than The Cp-1 Tariff Rates

As demonstrated in Table 3 of Blackhawk's Response to the Staff Report, for each load factor, the cost for Illinois Power to supply each Cp-1 customer at each load factor is greater than the Cp-1 cost listed in the Staff Report. Therefore, contrary to the assertions contained in the Proposed Order, as well as the Staff Report, Illinois Power is **not** able to economically supply electric power and energy to WE retail customers.

3. Illinois Power Cannot Purchase Power From Edison And Economically Sell Such Power To Retail Customers In WE's Service Territory

Again, it is unclear if the Proposed Order relied upon Staff's incorrect conclusion that Illinois Power could purchase power from Edison to economically deliver power to WE's retail customers. As an initial matter, this analysis is improper as a matter of law. *See* 220 ILCS 5/16-115. The Act provides that it must be both **"physically and economically"** possible for the Illinois electric utility to deliver electric power and energy into the service area of an applicant's utility affiliate. Suggesting that an Illinois electric utility may merely purchase the electricity from a neighboring utility and wheel it into the service area of the applicant's affiliate, would render the term "physically" a nullity. That is, the Illinois electric utility would always be able to physically deliver the electric power and energy into the service area of the applicant's utility affiliate. Such a result is contrary to the basic principles of statutory construction and would constitute reversible error. *See Patterson v. City of Peoria*, 386 Ill. 460, 463 (1944).

a. Illinois Power Cannot Economically Serve WE Cp-1 Customers

The Staff Report relies upon a flawed analysis and unsupported analysis to incorrectly conclude that Illinois Power could purchase power to economically serve WE Cp-1 customers. The costs for IP to serve WE's retail customers are **greater** than the Cp-1 average costs that were contained in the Staff Report for each load factor. (*See* Blackhawk Response to Staff Report at 8, Table 2.) Thus, contrary to the unsupported assertions in the Staff Report, which may or may not have been relied upon for the conclusion in the Proposed Order, Illinois Power cannot economically deliver power to WE Cp-1 customers.

b. Illinois Power Cannot Economically Serve WE Cg-3 Customers

Finally, the Staff Report relies upon the same mistaken logic to assert that Illinois Power could serve Cg-3 customers economically if it purchased power from Edison and delivered it to WE's retail customers. However, the Staff Report fails to include load factor adjusted costs associated with serving Cg-3 customers. The Staff Report indicates that Blackhawk calculated a market value of $61.89 for Cg-3 customers. However, as stated above, Staff simply was incorrect; Blackhawk calculated a cost to supply Commercial TOU customers using a cost of service study.

In its Application, Blackhawk indicated a WE Commercial TOU customer with a 60% load factor would have a rate of $51.38/MWH. (*See* Blackhawk Application, Attachment C, Table C-7.) Additionally, Blackhawk demonstrated that the market price for Illinois Power to serve this type of customer (using NFF values as the basis for market prices) would be $61.89/MWH. (*See id.* at 13.) Assuming arguendo that Illinois Power could purchase power from Edison and satisfy the reciprocity provision under the Act,

the cost of the power would need to be adjusted for the actual load factor and for the WE delivery costs of the Commercial TOU customer. Staff failed to make this appropriate adjustment in its analysis

Nevertheless, Blackhawk made the appropriate adjustments and presented uncontroverted information that the actual cost for Illinois Power to purchase Edison wholesale power and deliver it to a WE Commercial TOU customer with a 60% load factor would be $62.38/MWH; whereas the comparable cost the Commercial TOU customer pays WE for electric power and energy is currently $51.38/MWH. Accordingly, Illinois Power cannot economically deliver power to the Commercial TOU customers by purchasing power from Edison.

IV.

THE RECIPROCITY PROVISION IN THE ACT WILL NOT WITHSTAND A CONSTITUTIONAL CHALLENGE

The reciprocity provision in Section 16-115 of the Act is burden that is placed upon any out-of-state company that applies to become a certificated ARES in Illinois. If an out-of-state applicant or an entity affiliated with the applicant owns or controls facilities for the distribution and transmission of electricity in its own defined service territory, then that out-of-state applicant or its affiliate must provide reasonably comparable delivery service to the Illinois electric utility in whose service area the proposed service will be provided by the ARES. (*See* 220 ILCS 5/16-115.) Although the reciprocity provision may have been designed to encourage other states into an open market for electrical services, the Act discriminates against out-of-state entities on its face, and in its effect. As a direct result of this discrimination, the reciprocity provision is an impermissible burden on interstate commerce, and is, therefore, unconstitutional.

The "dormant" or "negative" Commerce Clause prohibits a state from enacting any legislation which burdens interstate commerce, unless the state has been empowered by Congress to enact such legislation. (*See* U.S. Const. art. I, § 8, cl. 3.) The United States Supreme Court has directed courts to use a "strict scrutiny" test to analyze the constitutionality of State laws that facially discriminates against out-of-state parties. (*See Sporhase v. Nebraska*, 458 U.S. 941, 958 (1982).) There is a presumption that such laws violate the Commerce Clause unless the state can prove that the discriminatory statute is necessary and is the least restrictive way to achieve an important governmental interest. However, even if a court were to use the more liberal "*Pike* balancing test," which is used to analyze discriminatory laws that treat in-state and out-of-state interests alike but have a discriminatory impact, the reciprocity provision would be found to be unconstitutional. (*See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).) The reciprocity provision of the Act fails both tests, and is, therefore, unconstitutional under the Commerce Clause.

A. THE RECIPROCITY PROVISION IS UNCONSTITUTIONAL BECAUSE IT FAILS THE STRICT SCRUTINY TEST

On its face, the reciprocity provision in the Act discriminates against out-of-state competitors. (*See* 220 ILCS 5/16-115(d).) If a state law is found to facially discriminate against out-of-state interests, there is a presumption that the law violates the dormant Commerce Clause. (*See Sporhase*, 458 U.S. at 957-958.) Such a facially discriminatory statute may stand only if the state can prove that (1) the law is necessary, and (2) the law is the least restrictive method to achieve an important governmental purpose.

The Supreme Court has consistently used the strict scrutiny standard to analyze reciprocity laws; and courts will use this standard to determine that the reciprocity provision of the Act is also unconstitutional. (*See, e.g., GM v. Tracy*, 519 U.S. 278

(1997).) In *Tracy*, the Court upheld an Ohio law that gave sales and use tax exemptions to in-state marketers of natural gas, and not to out-of-state natural gas marketers. The Court upheld the law because it determined that the Local Distribution Companies served different markets than the out-of-state entities. However, *Tracy* is very different from the instant proceeding, in which in-state and out-of-state utilities are competing for the same markets. As the Supreme Court stated in *Tracy*, "If a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are similarly situated - such facial discrimination will be subject to high level scrutiny even if directed toward a legitimate [goal]." *Id.* at 307, n.15.

1. The Reciprocity Provision Is Not Necessary, And Does Not Achieve An Important Governmental Purpose

The reciprocity provision of the Act fails the strict scrutiny test because the provision is not necessary and does not achieve an important governmental purpose. Promoting deregulation of the retail electric markets in other states is not a legitimate basis for discriminatory treatment of out-of-state ARES applicants.

It is not sufficient that the avowed purpose of the reciprocity provision is to encourage trade. For example, in *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366 (1976), the Court struck down a Mississippi regulation that permitted milk from out of state to be sold in Mississippi only if the state of origin accepted milk from Mississippi on a reciprocal basis. The Court dismissed Mississippi's assertion that the reciprocity requirement is in effect a free-trade provision, designed to level the playing field. The Court stated, "Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement." *Id*. at 379.

Similarly, in *New Energy Corp. v. Limbach*, 486 U.S. 269 (1988), an Ohio statute awarded a tax credit for in-state producers of ethanol, but only offered the credit to out-of-state producers if that state provided for similar tax treatment of Ohio-produced ethanol. The Court found the tax credit violated the Commerce Clause because the statute was facially discriminatory, and the two purposes advanced by the State, health and commerce, were factually insufficient:

> "The reciprocity requirement is designed to increase commerce by encouraging other States to enact ethanol subsidies . . . In sum, *appellees' health and commerce justifications amount to no more than implausible speculation,* which does not suffice to validate this plain discrimination against producers of out-state manufacture."

Id. at 279-280. (Emphasis added.)

The courts' analysis of reciprocity provisions consistently reiterate two major themes. First, a reciprocity provision cannot be used to further economic competition or to encourage other states to open their market. The Supreme Court in *Cottrell* and *New Energy* clearly stated that such discriminatory provisions cannot be used as a weapon. (*See Cottrell* at 379; *New Energy* at 274.) Second, even if the reciprocity provision is being used to promote legitimate interests, the provision nevertheless is unconstitutional if there are other less restrictive means to achieve the stated purpose.

2. The Reciprocity Provision Is Not The "Least Burdensome Means" Of Achieving Any Legitimate State Purpose

Even if the there were health, safety or welfare concerns that formed the basis for the reciprocity provision, the reciprocity provision in Section 16-115 is not the "least burdensome means" of achieving those goals. As a result, the reciprocity provision inevitably will be found to be unconstitutional.

Illinois can regulate the transition from monopoly to open competition in many other less restrictive ways. Illinois could require licensing or other limitations on out-of-state utilities, just as it does for in-state utilities, without completely banning out-of state utilities which do not provide reciprocal access. The Act already provides several mechanisms to help in-state utilities ensure financial stability for service to its citizens, and it is unclear if the reciprocity provisions add any additional benefits. (*See* 220 ILCS 5/18-101, *et seq.*; 220 ILCS 5/16-106, -108, -111.) In short, the reciprocity provision is an overly restrictive means of achieving the State's goals, and, if challenged, will be found to be unconstitutional.

B. THE ILLINOIS RECIPROCITY PROVISION IS UNCONSTITUTIONAL BECAUSE IT FAILS THE *PIKE* BALANCING TEST

Although it is unlikely, a court might use an alternative test to determine the constitutionality of the Act's reciprocity provision. Regardless of the test that is used, the reciprocity provision fails. As described in *Pike*, "where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The *Pike* balancing test requires: (1) that the state have a legitimate interest, and (2) that the burden imposed on interstate commerce is not clearly excessive in relation to the putative local benefits. The reciprocity provision of the Act fails this test because the law arbitrarily limits the ability of certain out-of-state companies to compete in Illinois, but not others. Furthermore, as a direct result of this arbitrary discrimination, the state interests are not being furthered, and the local benefits are not being realized.

1. The Reciprocity Provision Arbitrarily Discriminates Against Certain Out-Of-State Applicants And Therefore Does Not Further Any State Interests.

The language of the Act arbitrarily discriminates against a select few potential applicants, placing conditions on their ability to enter the Illinois electrical market. The Act requires reciprocity for those out-of-state applicants that are located in areas where an Illinois utility can "physically and economically" deliver energy. Therefore, certain utilities or affiliates of utilities located in Indiana, Iowa, Missouri and Wisconsin are barred from freely entering the Illinois market if an Illinois utility can "physically and economically" deliver energy to their markets. However, the Act does not place the restrictions on other "far-away state" utilities from supplying Illinois citizens with energy since an Illinois utility may not "physically and economically" be able to deliver energy to that "far-away state."

The Illinois General Assembly has decided to break from the traditional monopolistic practices of utility regulation by introducing a competitive marketplace. However, once the decision has been made to open its borders to a competitive marketplace, Illinois cannot further handicap certain utilities by imposing such restrictions and thereby creating a "selectively-competitive" marketplace where the Illinois General Assembly arbitrarily decides who may compete. Such restrictions are the exact conditions that the Commerce Clause was intended to prohibit. Finally, any State interest that was to be protected through the reciprocity provision is now vulnerable to a competitor from a "far-away state" entering the market.

2. The State Does Not Realize Any Local Benefits Under The Reciprocity Provision.

The reciprocity provision will be declared unconstitutional because the State does not realize any local benefits through this provision, but the burden on interstate

commerce is clearly excessive. The State may claim that the law furthers a competitive marketplace, provides for a level playing field, protects the viability of in-state utilities, or ensures the reliable delivery of energy to its citizens. However, none of these benefits and interests will be realized since the reciprocity provision applies only to a select few utilities, while other utilities may freely enter the Illinois market. In fact, the provision simply encourages the creation of a third party system, where the utilities that are subject to the reciprocity provision will seek out far-away-state utilities to enter the Illinois market on their behalf. As a result, transaction fees will increase, value will be destroyed, the benefits of free competition to the Illinois citizens will decrease, and any asserted concerns of Illinois will not be addressed. Since the provision restricts competition to a select few players, but not others, does not achieve any state benefits, and is an excessive burden on interstate commerce, if reviewed by a court, it will be declared unconstitutional.

V.

CONCLUSION

The Commission previously has concluded that as long as an ARES Applicant can demonstrate that it is either uneconomical or physically impossible for an Illinois electric utility to deliver electric power and energy to retail customers of an out-of-state utility affiliate, the ARES Applicant can meet the reciprocity requirements in the Act. (*See*, Wisconsin Public Service Energy Services, Inc., *Application for a Certificate of Service Authority as an Alternative Retail Electric Supplier,* Docket 00-0199, Order at 9.) Throughout the instant proceeding, Blackhawk has demonstrated that it complies with the reciprocity requirements of the Act because electric power and energy cannot be economically delivered from the service territories of Edison and Illinois Power to serve retail load in the service areas of Blackhawk's utility affiliates.

Nevertheless, the Commission, for whatever unexplained reason, has decided to change its policy during this crucial transition period to competition.

Blackhawk has demonstrated that it is uneconomical for Edison and Illinois Power to deliver electric power and energy to retail customers of Blackhawk's affiliates' WE and Edison Sault. Blackhawk relied upon the identical methodology used by WPS Energy to demonstrate that it is uneconomical. In addition, Blackhawk calculated the total cost to deliver electric power and energy to retail customers of WE and Edison Sault by using the same cost components that the Commission accepted in the WPS Energy application.

Blackhawk has satisfied fully the requirements contained in the Act and the Commission's Rules and regulations.

WHEREFORE, Blackhawk Energy Services, L.L.C. respectfully requests that the Commission revise the Proposed Order and enter an Order that:

(1) Grants Blackhawk a certification of service authority as an ARES in Illinois to serve non-residential retail electric users with an annual consumption of 15,000 kWh or more in the Commonwealth Edison and Illinois Power service territories; and

(2) Grants such other or additional relief that the Commission deems necessary and appropriate to grant Blackhawk a certification of service authority as an ARES.

Respectfully submitted,

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